

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,  
Plaintiff,  
v.  
JESUS FRANCISCO GONZALES,  
Defendant.

Case No.: 13-cr-3368GPC

**ORDER DENYING MOTION FOR  
REDUCTION OF SENTENCE  
PURSUANT TO 18 U.S.C. § 3582(c)(2)**

[ECF Nos. 30, 34, 40]

**I. INTRODUCTION**

On January 31, 2013, Jesus Francisco Gonzales (“Defendant”) was sentenced to a custodial term of 57 months for a conviction of possession of cocaine. (*See* ECF No. 27.) Defendant originally received a fast-track downward departure under USSG § 5K3.1. In 2014, the United States Sentencing Commission promulgated Amendment 782 (“Drugs Minus 2”), which, effective November 1, 2014, lowered the base offense levels for most drug quantities in USSG § 2D1.1(c), and made this change retroactive via Amendment 788. *See also* USSG § 1B1.10(c).

On August 25, 2014, Defendant filed a motion for reduction of sentence under 18 U.S.C. § 3582(c). (ECF No. 30.) On September 15, 2014, the Government filed its response asserting that Defendant is ineligible for any reduction because the lower limit of the amended guideline range is higher than Defendant’s originally imposed sentence and

1 Defendant's motion is premature. (ECF No. 32.) On January 9, 2015, Defendant filed a  
 2 second motion for reduction of sentence under 18 U.S.C. § 3582(c). (ECF No. 34.) On  
 3 January 12, 2015, The Court provisionally appointed Federal Defenders of San Diego, Inc.  
 4 ("FDSDI") to initially represent Defendant. (ECF No. 35.) On February 10, 2015,  
 5 Defendant filed a third motion for reduction of sentence under 18 U.S.C. § 3582(c). (ECF  
 6 No. 37.) On September 4, 2015, Defendant filed a fourth motion for reduction of sentence  
 7 under 18 U.S.C. § 3582(c). (ECF No. 40.)

8 Finding that Defendant's current sentence is the lower than the low-end of the  
 9 amended guideline range, the Court **DENIES** Defendant's petition to reduce sentence.

## 10 **II. DISCUSSION**

### 11 **A. Modification of Sentence Under 18 U.S.C. § 3582(c)**

12 Generally, a federal court "may not modify a term of imprisonment once it has been  
 13 imposed." 18 U.S.C. § 3582(c). An exception to that rule lies "in the case of a defendant  
 14 who has been sentenced to a term of imprisonment based on a sentencing range that has  
 15 subsequently been lowered by the Sentencing Commission." § 3582(c)(2). When the  
 16 Commission makes a Guidelines amendment retroactive, 18 U.S.C. § 3582(c)(2)  
 17 authorizes a district court to reduce an otherwise final sentence that is based on the  
 18 amended provision. Any reduction must be consistent with applicable policy statements  
 19 issued by the Sentencing Commission. *Id.*

20 Amendment 782 to the United States Sentencing Guidelines, effective November 1,  
 21 2014, lowered the penalties for most drug offenses by reducing the offense level in the  
 22 § 2D1.1 Drug Quantity Table by two levels. In Amendment 788, the Sentencing  
 23 Commission decreed that Amendment 782 may be applied retroactively to lower the  
 24 sentences of previously sentenced inmates.

25 In *Dillon v. United States*, 560 U.S. 817, 826-27 (2010), the Supreme Court set forth  
 26 a two-step inquiry for assessing a motion for reduction of sentence under § 3582(c). *Id.*

27 At step one, § 3582(c)(2) requires the court to follow the Commission's  
 28 instructions in § 1B1.10 to determine the prisoner's eligibility for a sentence

1 modification and the extent of the reduction authorized. Specifically,  
 2 § 1B1.10(b)(1) requires the court to begin by “determin[ing] the amended  
 3 guideline range that would have been applicable to the defendant” had the  
 4 relevant amendment been in effect at the time of the initial sentencing. “In  
 5 making such determination, the court shall substitute only the amendments  
 6 listed in subsection (c) for the corresponding guideline provisions that were  
 applied when the defendant was sentenced and shall leave all other guideline  
 application decisions unaffected.”

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7 At step two of the inquiry, § 3582(c)(2) instructs a court to consider any  
 8 applicable § 3553(a) factors and determine whether, in its discretion, the  
 9 reduction authorized by reference to the policies relevant at step one is  
 warranted in whole or in part under the particular circumstances of the case.

#### 10 **B. Determination of Amended Guideline Range**

11 Under § 1B1.10, a defendant is eligible for a sentencing modification when an  
 12 amendment listed in § 1B1.10(d) lowers “the guideline range that corresponds to the  
 13 offense level and criminal history category determined pursuant to §1B1.1(a), which is  
 14 determined before consideration of any departure provision in the Guidelines Manual or  
 15 any variance.” USSG § 1B1.10 n.1(A). § 1B1.10(b)(2) confines the extent of the reduction  
 16 authorized. Once the Court determines the amended guideline range, it “shall not reduce  
 17 the defendant's term of imprisonment . . . to a term that is less than the minimum of the  
 18 amended guideline range.” *Id.* § 1B1.10(b)(2)(A). The only exception to this prohibition  
 19 applies if the defendant previously received a downward departure “pursuant to a  
 20 government motion to reflect the defendant's substantial assistance to authorities.” In that  
 21 case, the Court may apply “a reduction comparably less than the amended guideline range.”  
 22 *Id.* § 1B1.10(b)(2)(B).

23 As Amendment 782 is listed in § 1B1.10(d), the Court must determine the “amended  
 24 guideline range” that would have been applicable to the defendant had Amendment 782  
 25 been in effect at the time of the sentence. USSG § 1B1.10(b)(1). Defendant argues that  
 26 her sentence should be reduced pursuant to 18 U.S.C. § 3582(c)(2).

27 The Court finds that Defendant’s position is irreconcilable with the applicable  
 28 Sentencing Commission comments. Note 1(A) to § 1B1.10 specifically states that the

1 amended guideline range “is determined before consideration of any departure provision  
 2 in the Guidelines Manual or any variance.” § 1B1.10 n.1(A) (emphasis added). A  
 3 commentary provision—such as Application Note 1, “which functions to interpret a  
 4 guideline or explain how it is to be applied”—is binding as long as the Commentary does  
 5 not conflict with the Constitution, a federal statute, or the guideline at issue. *Stinson v.*  
 6 *United States*, 508 U.S. 36, 42-43 (1993) (internal quotation marks and alterations omitted).  
 7 Thus, the Court may not factor in a “fast-track” or any other departure into the amended  
 8 guideline range unless an exception exists.

9 The exception to this rule is found in § 1B1.10(b)(2)(B). Under § 1B1.10(b)(2)(B),  
 10 reductions “comparably less than the amended guideline range” are permitted only in cases  
 11 where the original term of imprisonment was below the applicable guideline range  
 12 “pursuant to a government motion to reflect the defendant's substantial assistance to  
 13 authorities.” *Id.* § 1B1.10(b)(2)(B). Every circuit court that has addressed the issue agrees  
 14 that § 1B1.10(b)(2)(B) bars a district court from lowering a defendant's below-guideline  
 15 sentence unless the departure at his original sentencing was based on his substantial  
 16 assistance to the government. *See United States v. Berberena*, 694 F.3d 514, 518-19 (3d  
 17 Cir. 2012); *United States v. Anderson*, 686 F.3d 585, 588 (8th Cir. 2012); *United States v.*  
 18 *Glover*, 686 F.3d 1203, 1207 (11th Cir. 2012); *accord United States v. Colon*, 707 F.3d  
 19 1255, 1258 (11th Cir. 2013); *United States v. Lizalde*, 502 Fed. Appx. 655, 657 (9th Cir.  
 20 2012) (unpublished); *United States v. Beserra*, 466 Fed. Appx. 548, 550 (7th Cir. 2012)  
 21 (unpublished).

22 A § 5K3.1 “fast-track” motion is not a motion for substantial assistance. Unlike a  
 23 substantial assistance motion, it is limited to four levels and must be made pursuant to an  
 24 early disposition program authorized by the Attorney General and the United States  
 25 Attorney for the district in which the court resides. Unlike § 5K1.1, it does not require  
 26 “substantial assistance in the investigation or prosecution of another person.” In addition,  
 27 Note 3 to § 1B1.10 omits a § 5K3.1 motion as one for substantial assistance. Note 3  
 28 specifically provides that “[t]he provisions authorizing such a government motion are

§ 5K1.1; (2) 18 U.S.C. § 3553(e); and (3) Fed R. Crim. P. 35(b).” *Id.* n.3. Further, a defendant’s “amended guideline range” does not incorporate previously granted departures pursuant to § 4A1.3 as they also do not qualify as “substantial assistance departures.”

Ultimately, the Commission decided to impose a “single limitation applicable to both departures and variances” in order to “avoid unwarranted sentencing disparities” and “undue complexity and litigation.” *Hogan*, 722 F.3d at 61. This decision limits the number of defendants who will be able to obtain relief under § 3582(c)(2) in light of the guideline amendments. The First Circuit has commented that it is “troubled by the extent to which the amended policy statement and Application Notes severely limit the number of defendants . . . who will be able to obtain relief” but recognized that “in these instances the district court’s hands [are] tied.” *Id.* at 63.

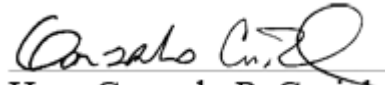
The present case involved the possession of 19.55 kilograms of cocaine. Defendant had a criminal history score of 7 at the time of sentencing and was in criminal history category IV. Under the guidelines in effect at the time of sentencing, the base offense level was 34. The Court reduced the guidelines by 12 levels: 3 levels based upon mitigating role (§ 2D1.1(a)(5)); 2 levels for minor role (§ 3B1.2(b)); 3 levels for acceptance of responsibility (§ 3E1.1(a) & (b)); and 4 levels for “fast-track” resolution (§ 5K3.1). The Court found that the adjusted offense level was 22 and the applicable guideline range was 63 to 78 months. Pursuant to § 4A1.3 (overrepresentation of criminal history), the Court further departed from the advisory guideline range by 6 months, and sentenced Defendant to a custodial term of 57 months.

Applying the amended base offense level provided by Amendment 782, the base offense level is 32. Leaving all other guideline application decisions unaffected and removing departures and variances results in a reduction of 7 levels: 2 levels based upon mitigating role (§ 2D1.1(a)(5)); 2 levels for minor role (§ 3B1.2(b)); and 3 levels for acceptance of responsibility (§ 3E1.1(a) & (b)). The adjusted offense level is 25, the Criminal History Category is IV and the applicable guideline range is 84 to 105 months. In the instant case, Defendant received a below-guideline sentence based on “fast-track”

1 and criminal history inadequacy, not substantial assistance to the government. To obtain  
2 relief under § 3582(c), the guideline amendments at issue must “lower[]” a defendant's  
3 applicable guideline range. U.S.S.G. § 1B1.10(a)(2)(B) (“A reduction in [a] defendant's  
4 term of imprisonment is not consistent with this policy statement and therefore is not  
5 authorized under 18 U.S.C. § 3582(c)(2) if . . . [the amendment] does not have the effect  
6 of lowering the defendant's applicable guideline range”). Here, they do not. Defendant's  
7 amended guideline range is 84 to 105 months and he received a sentence of 57 months.  
8 Since the lower limits of the amended guideline range is higher than the original sentence,  
9 Defendant is ineligible for modification of his sentence.

10 Accordingly, the Court **DENIES** Defendant's motion for a sentence reduction under  
11 18 U.S.C. § 3582(c)(2).

12 Dated: October 29, 2015

  
13 Hon. Gonzalo P. Curiel  
14 United States District Judge  
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